No. 85-926

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CHRISTIAN BROADCASTING NETWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS IN SUPPORT OF PETITIONER OUT OF TIME AND BRIEF FOR RESPONDENTS OLD-TIME GOSPEL HOUR AND PTL TELEVISION NETWORK IN SUPPORT

W. Thad Adams, III, Esq.
W. THAD ADAMS, III, P.A.
1401 B. B. & T Center
Charlotte, N.C. 28202
(704) 375-9249

John H. Midlen, Jr., Esq.
JOHN H. MIDLEN, JR., CHARTERED
1050 Wisconsin Avenue, N.W.
Washington, D.C. 20007
(202) 333-1500

Attorneys for Respondents
Old-Time Gospel Hour
and PTL Television Network

January 27, 1986

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

No. 85-926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CHRISTIAN BROADCASTING NEWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
MOTION PICTURE ASSOCIATION AMERICA, INC., *ET AL.*
Respondents.

MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS IN SUPPORT OF PETITIONER OUT OF TIME

Respondents Old-Time Gospel Hour (Old-Time) and PTL Television Network (PTL) herewith move for leave to file the attached brief in support of issuance of a writ of certiorari out of time. On December 19, 1985 at the request of two respondents (albeit in opposition) this Court extended the "time within which to file a response to the petition for a Writ of Certiorari ... to and including January 27, 1986, *for all respondents.*" (Emphasis added.) Respondents Old-Time and PTL interpreted that extenstion to embrace them. On advice of the Office of the Clerk that such was not the intent of the extension, Old-Time and PTL herewith request their inclusion in the foregoing extenstion.

On January 21, 1986, a copy of the manuscript of the Brief in Support was served on all other respondents, either by hand or by overnight mail. Thus, any parties who might oppose the Petition have been apprised of the text of Old-Time's and PTL's brief and therefore can in no way be

prejudiced should they wish to address its substance.

Respectfully submitted,

W. Thad Adams, III, Esq.
W. THAD ADAMS, III. P.A.
1401 B B & T Center
Charlotte, N.C. 28202
(704) 375-9249

John H. Midlen, Jr., Esq.
JOHN H. MIDLEN, JR., CHARTERED
1050 Wisconsin Ave., N.W.
Washington, D.c. 20007
(202) 333-1500

Attorneys for Respondents
Old-Time Gospel Hour
and PTL Television Network

January 27, 1986

QUESTIONS PRESENTED

The questions presented for review are as set forth by Petitioner, The Christian Broadcasting Network, Inc. (CBN).

LIST OF PARTIES

The list of parties in the consolidated cases below, Nos. 84-1230 *et al.* and 84-1519 *et al.* is as set forth by CBN.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. 85-926

THE CHRISTIAN BROADCASTING NETWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

BRIEF FOR RESPONDENTS OLD-TIME GOSPEL HOUR AND PTL TELEVISION NETWORK IN SUPPORT

Respondents Old-Time Gospel Hour (Old-Time) and PTL Television Network (PTL)[1] herewith support the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by The Christian Broadcasting Network, Inc. (CBN), seeking review of the Opinion and Order filed August 20, 1985 jointly in *National Association of Broadcasters* v. *Copyright Royalty Tribunal*, D.C. Cir. Nos. 84-1230 *et al.* and in *The Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal*, D.C. Cir. Nos. 84-1519 *et al.*,

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[1] Formally incorporated as Heritage Village Church and Missionary Fellowship, Inc.

affirming the final determinations of the Copyright Royalty Tribunal (CRT or Tribunal) as to distributions of copyright royalties for cable television retransmission of copyrighted works for the years 1979, 1980 and 1982.

Respondents' brief in support of petitioner is submitted pursuant to Rule 19.6 of this Court.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

The opinions below, jurisdiction, statutes involved and statement of the case are as set forth by CBN.

REASONS FOR GRANTING THE WRIT

Old-Time and PTL concur with CBN's stated reasons for granting the writ, particularly with respect to the split between the Circuits. Indeed, those reasons are enhanced by focusing attention on the testimony of the Tribunal's then Acting Chairman in hearings on Copyright Royalty Tribunal Reform before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. That testimony followed the Second Circuit's decision in *Acemla* v. *Copyright Royalty Tribunal*, 763 F.2d 101 (2d Cir. 1985). There it was decided that the Tribunal erred in permitting ASCAP and BMI, on the mere strength of an agreement and without presenting a case, to reap the spoils of all juke box royalties to which entitlement was not otherwise proven by a non-agreeing claimant. Hoping the District of Columbia Circuit would not follow suit, the Acting Chairman correctly predicted a split between it and the Second Circuit on the first issue advanced by CBN, *i.e.*, whether the Tribunal has authority to allocate royalty funds to claimants who have not proved their entitlement. Interestingly the Acting Chairman's solution to the impending conflicting decisions between the Circuits is to abolish judicial review in any Circuit but the District of

Columbia Circuit. The Tribunal's position is:

> *Judicial Review*. The Tribunal is currently faced with a potential split with the Second Circuit and the D.C. Circuit Courts of Appeals. The Second Circuit has recently decided a case involving the burden of proof of settling parties versus non-settling parties. The D.C. Circuit has a similar issue pending in another distribution proceeding. The Tribunal recommends that the Copyright Act be amended to allow that no court other than the United States Court of Appeals for the District of Columbia [Circuit] shall have jurisdiction to review a final decision of the Copyright Royalty Tribunal.[2]

As CBN points out, "The result reached below is in direct conflict with the Decision reached three months earlier by the Second Circuit in *Acemla* ..." *supra*. Legislative reform of the Copyright Royalty Tribunal is stalled, and there is no reason to suppose that the Tribunal's wish will come true. A split in the Circuits will remain, and absent unexpected Congressional action it can be presumed that appeals will be filed at Circuits other than the District of Columbia. Cable television royalty distributions are an annual event, now about $100 million each. So far there has never been a universal settlement among the claimants.[3] The matter of the "burden of proof of settling parties versus non-settling parties" is very likely to arise again in future years' litigation, especially inasmuch as heretofore the non-settling parties have not

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[2] Hearings on Copyright Royalty Tribunal Reform before the House Subcom. on Courts, Civil Lib. and Admin. of Justice, 99th Cong., 1st Sess. (Testimony of The Honorable Edward W. Ray, July 11, 1985 at p. 8) (Unpublished).

[3] Other than an agreement as to one year to accept the same percentage as finally awarded in another year.

On remand, based upon the earlier records (for the years 1979 and 1980), the Tribunal allocated 0.35% to these parties. With respect to the subsequent year (1982), based upon a new and expanded hearing record, the Tribunal increased that allocation three-fold to a full 1%. The texts of the Tribunal's decisions on remand and in the 1982 proceeding reflect no hint of any bias against religious programs.

The court of appeals, which had been responsible for the earlier remand, gave these Tribunal decisions a searching review and, without dissent, affirmed the Tribunal. With regard to the contrasting cases in the record for public television and the religious program producers, the court stated:

> We also indicated in our prior decision that the Tribunal had failed to provide an adequate justification for treating the Devotionals' claims in a manner different from that accorded the claim of PBS. *Id.* On remand, the CRT elaborated on its reasons for this difference in treatment:
>
> > The Devotional Claimants present only a single program while public broadcasting offers a range of programs, that in its diversity attracts a broad range of audience. The carriage of the public broadcasting signals indicates the appeal of their programing [sic]. Devotional programmming [sic] is but a small portion of a distant signal. Therefore, the carriage of that signal does not establish the appeal of devotional programming.

> 49 Fed. Reg. 20,050, J.A. at 2211. That is to say, inasmuch as a PBS station carries only PBS programming, the Tribunal concluded that a cable operator's decision to carry a PBS station reflects a judgment that PBS programming is of value. On the other hand, the decision to carry a station that carries one or more programs of the Devotional Claimants does not necessarily represent a determination by the cable operator that it was the devotional portion of that station's programming which was deemed valuable. Since the vast majority of that station's programming would be non-devotional, the Tribunal could reasonably conclude that it is more likely that the station was being carried by the cable operator because of its other, nondevotional shows. [fn. omitted]

Appendix to Petition at 12a-13a.

III

Petitioner has failed to provide the Court with the requisite "special and important reasons" to grant certiorari. SUP. CT. R. 17.1. It is clear that petitioner has not presented the Court with an important question of constitutional law which has not been, but should be, settled by this Court. *Id.* As demonstrated in the foregoing sections, petitioner's argument that the Tribunal's treatment of the public television claimants and the religious program claimants reflects anti-religious bias is without merit. Contrary to petitioner's characterizations of the lower court's decisions on review, the court *did* subject the Tribunal's actions to full and strict scrutiny. Indeed the court

remanded to the Tribunal the initial zero award because of concerns as to the adequacy of the Tribunal's reasoning.

In response to that remand the Tribunal removed any vestiges of the allegedly discriminatory "taint", both in the language employed in the Tribunal's decision and in its action—awarding the devotional claimants a portion of the royalties. On appeal, the court found that the Tribunal had acted rationally and reasonably in its treatment of the devotional claimants and had adequately explained its different treatment of PBS and those claimants. The court also specifically addressed petitioner's claims of religious bias and found them unsupported by the record. Nothing in this Court's decisions requires more.

The cases cited by the petitioner do not support its position. They involved factual situations in which there was governmental action affirmatively supporting religious views, *Epperson v. Arkansas*, 393 U.S. 97 (1968), or which burdened the exercise of religious or other First Amendment rights. *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981); *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936).[4] No such governmental involvement or

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[4]Petitioner's reliance on *Swann v. Mecklenberg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968) is misplaced. Those cases involved detailed findings based on extensive trials of intentional, prolonged discriminatory activity by governmental officials. Here, petitioner is basing its claim of bias on two

interference with the exercise of religious activity is involved here. The court of appeals found that the Tribunal had used the same criteria to value petitioner's claims to the copyright royalties as it had used with respect to other claimants and that there was no evidence in the record to support petitioner's claim of anti-sectarian bias. The First Amendment does not require or permit more. *See Roemar v. Board of Public Works of Maryland*, 426 U.S. 736, 746-747 (1976); *King's Garden, Inc. v. FCC*, 498 F. 2d 51, *cert. denied*, 419 U.S. 996 (1974).

CONCLUSION

The petitioner has failed to establish the requisite "special and important reasons" which would justify grant of writ of certiorari. SUP. CT. R. 17. 1. (c). The petitioner has made no case that there has been any violation of applicable precedent of this Court or that the decision below otherwise warrants this Court's consideration.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GENE A. BECHTEL*
SHELLEY SADOWSKY
BECHTEL & COLE, CHARTERED
Suite 502
2101 L Street, N.W.
Washington, D.C. 20037
(202) 833-4190

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isolated phrases in the Tribunal's decisions, and an initial absence of award that was subsequently increased to a major level of award for three individual program producers.

THEODORE D. FRANK
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6016

Counsel for Public Broadcasting Service

JACQUELINE WEISS
Deputy General Counsel
PUBLIC BROADCASTING SERVICE
475 L'Enfant Plaza West, S.W.
Washington, D.C. 20024
(202) 488-5059

**Counsel of Record.*

January 27, 1986